

In the Matter of	)	
	)	
Rules and Regulations Implementing	)	CG Docket No. 02-278
the Telephone Consumer Protection Act	)	
of 1991	)	
	)	CG Docket No. 05-338
Junk Fax Prevention Act of 2005		

## Comment on Proposed Changes to the Junk Fax Prevention Act

### Introduction

The focus of this comment is on paragraphs 20 and 21 of the Notice of Proposed Rulemaking and Order proposing changes to the Junk Fax Prevention Act of 2005.<sup>1</sup> These paragraphs specifically address the Required Notice of Opt-Out<sup>2</sup> Opportunity in Section 2(c) of the Junk Fax Prevention Act. Section 2(c) requires

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<sup>1</sup> Notice of Proposed Rulemaking and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991: Junk Fax Prevention Act of 2005. FCC 05-206 (December 2005).

<sup>2</sup> I am unsure of why the FCC has chosen to use an opt-out format as opposed to an opt-in or a national “fax” registry. It is clear that the opt-out is much more advantageous to advertisers and would allow them to reach a larger base of people, in that anyone with an established business relationship (EBR) will be susceptible to junk faxes until the point at which they opt-out of receiving further junk faxes. The opt-in and national registry would be more protective of consumer rights and would result in those consumers who want to receive unsolicited faxes being the only people targeted by advertisers sending junk faxes.

The focus of this comment, however, is not to convince the FCC that they would be better off with a system different than the opt-out. Instead, the focus is to come up with a more efficient method for consumers to opt-out after already accepting that the opt-out itself is inefficient in comparison to methods such as the opt-in and a national registry.

that senders of unsolicited facsimile advertisements<sup>3</sup> must include a notice on the first page of the facsimile that informs the recipient that the recipient has the ability to request the sender not send future facsimiles unsolicited.<sup>4</sup> According to Section 2(c), the notice is required to be clear and conspicuous, on the first page of the facsimile, as well as state the ability and the means by which the receiver can opt-out of future unsolicited facsimiles from this sender. The sender is required to provide a domestic telephone number and facsimile number for the recipient to make their opt-out request as well as a cost free mechanism for the request to be made. Section 2(c) provides an exception for businesses that would be unduly burdened by providing recipients of their junk faxes with a cost free method for recipients to opt-out.

Paragraphs 20 and 21 call for comments on setting forth parameters for what would be considered to be “clear and conspicuous” notice.<sup>5</sup> The FCC currently requires that senders of faxes identify themselves in the message and give the telephone number where they can be reached. The goal in this aspect of the Junk Fax Prevention Act is to minimize the burden that the sender would have in complying with these requirements.

The current meaning of clear and conspicuous notice is opaque and

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<sup>3</sup> An “unsolicited advertisement” is defined by the FCC as, “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”

<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.* at 10.

inadequately defined. It is difficult to force an advertiser to comply with this definition without some uniform standard with which to hold the advertiser to. This is why I propose the use of a standard form that all advertisers that are sending unsolicited facsimiles should have to use. This will make the ability of the consumer to identify such material nearly instantaneous and will give advertisers more certainty that they are in compliance with the law.

There is also a call for comment on whether a time limitation of thirty (30) days is the shortest reasonable time in which a sender of a junk fax must comply with a recipient's request that no further junk faxes be sent.<sup>6</sup> This 30-day limitation is far too long and will result in consumers receiving unsolicited advertisements from the advertisers who have already received their opt-out for an additional 30 days. With today's modern technology, the sending of the facsimile is no longer done by hand and is instead automated through the use of computers.<sup>7</sup> It should not take more than one week to comply with an opt-out.

### **"Clear and Conspicuous" Notice**

There have been several attempts to clarify what would be determined as clear and conspicuous, however; the term is not defined within the Junk Fax Prevention Act. The definition of clear and conspicuous notice is one of the

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<sup>6</sup> *Id.*

<sup>7</sup> [http://www.ehow.com/how\\_8467\\_send-fax-computer.html](http://www.ehow.com/how_8467_send-fax-computer.html)

mysteries of the law.<sup>8</sup> The definition of “clear and conspicuous” notice previously provided by the FCC is, “notice that would be apparent to the reasonable consumer.”<sup>9</sup>

The Small Business Administration (SBA) suggests that the FCC adopt the same definition for notice as is used in mobile service commercial messages.<sup>10</sup> The SBA version requires that, “notice be clearly legible, use sufficiently large type and be placed so as to be readily apparent to the recipient.”<sup>11</sup> The SBA does not endorse a common system of location and contact information because every small business has its own way of presenting itself.<sup>12</sup> The SBA misses the point of the legislation. This act is not concerned with making advertising appealing or easier for advertisers.

The Epic Organization is a public interest research center located in Washington, D.C.<sup>13</sup> The organization is focused on issues of civil liberties and privacy protection. Epic has attempted to come up with guidelines for what would

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<sup>8</sup> I have done extensive research into the area and no published case that I was able to find provides a definition of what constitutes “clear and conspicuous” notice. The concept is defined in the opposite, in that judges look to see what is not clear and conspicuous and decide that the advertiser has not met the standard. When clear and conspicuous notice is found to not be met by an advertiser, it is because a message is buried in small print or not distinguished from the rest of the message.

<sup>9</sup> 47 C.F.R. § 64.2401(e)

<sup>10</sup> [http://www.sba.gov/ADVO/laws/comments/fcc06\\_0314.html](http://www.sba.gov/ADVO/laws/comments/fcc06_0314.html)

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> <http://www.epic.org/epic/about.html>

be considered to be clear and conspicuous notice.<sup>14</sup> They suggest that in order for notice by an unsolicited advertiser to be considered to be clear and conspicuous, the notice must appear at the top of the page. Some advertisers print their notice at the bottom of the page in hopes that it will be truncated by the receiver's fax machine. Epic has also specified that the font be in black because many advertisers put their notice in gray ink that will not show up on conventional fax printouts. They also recommend that the notice be boxed off from the rest of the message so as to separate it from the rest of the text.

Other definitions of what would be considered to make clear and conspicuous notice of important terms would be to bold lettering, capitalized words, changes in the font size, and an offset text from the rest of the text on a page through the use of blank space around the notice. Ultimately, it will come down to the subjective decision of a judge and whether or not the judge feels that the advertisement clearly and conspicuously gives notice that it is an advertisement and that in order for the recipient to opt-out of further advertising, the indicated steps provided by the advertiser must be followed.

This subjectivity does not provide the FCC with a way for regulation that is certain to those solicitors sending junk faxes. Current methods of making something clear and conspicuous are so wide and varied that the lack of consistency ends up leaving room for advertisers to avoid providing consumers with a simple and effective means to opt out of further unsolicited advertisements. The answer to

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<sup>14</sup> <http://www.epic.org/privacy/telemarketing/jfpacom11806.html>

this question cannot be found with a more unambiguous definition of what is clear and conspicuous notice. In fact, because of its subjectivity, the standard of clear and conspicuous should be abandoned completely in favor of a method that is more certain. The answer is to find a uniform means to be followed by all advertisers that send unsolicited junk facsimiles.

### **Standard Notice Form**

A simple solution to the problem of defining “clear and conspicuous” would be to standardize the approach that senders of junk faxes or advertisements use. The process can be made consistent by the use of a standardized form. This standard form should include 1.) the name of the solicitor, 2.) a contact number where the solicitor can be reached, 3.) a fax number where the solicitor can be reached and an unequivocal message centered, partially capitalized and bolded reading:

**This Is An Advertisement.**

Please **CONTACT THE NUMBER BELOW TO OPT-OUT** of

**any**

**Future Unsolicited Advertisements or**

**FAX YOUR REQUEST TO THE FAX NUMBER BELOW.**”<sup>15</sup>

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<sup>15</sup> See Appendix A

In order to limit confusion and send the clearest possible message to the receiver, I have used a system of capitalization and underlining to put through the most important part of the message. The portion that informs the receiver that they can opt out of future junk faxes and the means by which this can be done are offset from the rest of the text on the page. The message also clearly indicates that the facsimile is an advertisement by rule of Junk Fax Prevention Act and the Telephone Consumer Protection Act of 1991(TCPA).<sup>16</sup>

Through standardization consumers that are being contacted by junk fax solicitors will be able to immediately identify any junk fax that they receive and will be able to easily opt-out with little time or effort spent. It will become as simple as pressing the delete button on an e-mail message. This is opposed to the unstandardized method that is currently employed by the Junk Fax Prevention Act that results in subjective assessment of clear and conspicuous notice.

Standardization of the form is also easier on the advertisers. They no longer have to worry about whether or not their forms meet the standard of “clear and conspicuous”. All of the guesswork involved in the decision will be taken out of the process of providing junk faxes. Enforcement of the Junk Fax Prevention Act also becomes much easier. If the first page of the unsolicited advertisement does not meet the exact standard of the form, then the solicitor is in violation and will be

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<sup>16</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. §227.

sanctioned by the required punishment under the Junk Fax Prevention Act.

### **Advertiser Usage of the Standard Form**

This standardization of the notice process through use of a form would only be applicable to those solicitors who do not have an established business relationship (EBR)<sup>17</sup> with the person to whom they are sending the advertisement. The EBR relationship could only be used to negate the form requirement if the sender of the advertisement is able to verify that such an EBR exists through documentation of the prior relationship.<sup>18</sup> This verification would also have to prove that the sender of the junk facsimile had the receiver's fax number prior to date of enactment of the Junk Fax Prevention Act.

If the advertiser does have an EBR with the recipient, then the advertiser should still be required to comply with the Junk Fax Prevention Act and inform the recipient that the relationship can be opted out of and how this opt out would work. One of the strongest reasons to use a standard form is to familiarize the consumer

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<sup>17</sup> Junk Fax Prevention Act, Sec. 2(a).

<sup>18</sup> In order to prevent advertisers from sharing fax numbers and claiming indirect EBR's, the FCC must be strict on its requirements for what documentation would provide proof that an EBR exists. In addition, the advertiser must show proof that the EBR is with the specific advertiser claiming an EBR, not a subsidiary, parent or associated company.

Going into exactly what would provide proof of an EBR is beyond the scope of this comment as this comment relates only to paragraph 20 and 21. However, such documentation should include a waiver by the consumer notifying the consumer that advertisements will be sent by fax to one specific fax number. Anything short of such a waiver will result in even more frequent abuse than would already take place even under the guidelines that would require use of the standardized form.



with its look and immediately bring to mind that this is an advertisement that has not been asked for, whereas the advertisement from an advertiser with an EBR has the possibility of having been requested by the recipient.

### **Enforcement of the Use of the Form**

After standardization has occurred, the problem becomes enforcement. Currently, the Junk Fax Prevention Act uses citations and fines to punish those that are in violation of the act. This will likely prove to be ineffective in controlling the majority of those that abuse the act and will result in many advertisers doing a cost benefit analysis. If the cost of the fines is too excessive to continue to be in violation, then the advertisers will simply go offshore and continue to send the junk faxes from another country.

How do you force advertisers to follow the rules and stick to a uniform system of providing access and simplicity in opting out? It would be nearly impossible for the FCC to keep track of all of the advertisers that use junk facsimiles in order to communicate with potential consumers of their good or service. It may be possible to implement a reporting system and then to punish those advertisers in violation of the Junk Fax Prevention Act, but this brings into question the reliability of such claims and forces investigation into the reality of the claims. If, instead, the government provided tax breaks for those advertisers that abided by the rules, it would allow for the advertisers to police themselves. In order to get the tax break,

an advertiser would have to avoid being cited or fined for a violation of the Junk Fax Prevention Act.

By providing an incentive to follow the rules, much of the problem of enforcement could be eliminated. If it is economically beneficial to the advertisers to follow the rules, then they will do so. The amount of the tax break has yet to be determined as more research has to be done on the matter in order to determine what type of tax break would provide enough incentive to the advertisers to follow the rules on their own.

These methods will not solve the problems created by the abuse of faxes by junk fax advertisers. The advertisers will continue to send junk faxes so long as there is a profit to be turned. These suggestions are intended to help the consumer by making it more apparent to the inundated fax recipient that what they are receiving is a junk fax and that there is a simple way to opt-out of receiving any further junk fax solicitations.

### **The 30-day Limitation**

The use of a 30-day time period to allow for advertisers to discontinue sending unsolicited junk facsimiles to a receiver who has requested to opt-out of any further advertisements. That means that an advertiser gets a 30-day window within which to continue to send their junk faxes without any repercussions. This allowance goes against the point of the legislation.

A company should not be allowed this lengthened grace period to bring themselves into compliance with the Junk Fax Prevention Act. It is rare that there is a company that is not using computers to coordinate their sending of junk facsimiles. With technology at the level it is at today, in comparison to ten years ago, when faxes were a more used method of communication, the turn-around time from when an opt-out is received by an advertiser, to when they should be able to discontinue their sending of any further junk facsimiles should be nearly instantaneous.

The amount of time that it takes to process the opt-out should be equivalent to the amount of time it takes to send the next fax to the recipient that has sent the opt-out. However, there may be coordination factors and technical aspects that have not been considered. Therefore the time period to come into compliance with the opt-out should be reduced from the excessive 30-days to a more conservative, yet still liberal seven days. Within one week, an advertiser should be able to discontinue sending any further faxes to a consumer that has opted-out.

Appendix A: Sample Unsolicited Fax Form

To:

Receiver's Name

Receiver's Fax Number

Receiver's Phone Number

Receiver's Address

**This Is An Advertisement.**

**Please CONTACT THE NUMBER BELOW TO OPT-OUT of  
any Future Unsolicited Advertisements or  
FAX YOUR REQUEST TO THE FAX NUMBER BELOW.**

From:

Sender's Name

Sender's Phone Number

Sender's Fax Number

Sender's Address